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UPTON

The United States, against the schooner "Stephen Hart" and her cargo

1863

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DISTRICT COURT
Of the United States.

SOUTHERN DISTRICT OF NEW-YORK.

THE UNITED STATES,

AGAINST

THE SCHOONER "STEPHEN HART"
AND HER CARGO.

IN PRIZE.

REPLY.

ARGUMENT OF THE COUNSEL FOR CAPTORS.

F. H. UPTON, of Counsel.

New-York:
FRANK McELROY, STEAM BOOK AND JOB PRINTER,
113 NASSAU STREET.

1863.

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1863. July 20.
Gift of
Hon. Charles Sumner.
(H. U. 1830)

District Court of the United States.

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES *against* The Schooner "STEPHEN HART" and her cargo.	IN PRIZE. *Reply.* *Argument of the Counsel for Captors,* F. H. UPTON, *Of Counsel.*

The schooner "Stephen Hart," an American built vessel, was lying in the port of New Orleans after the proclamation and actual institution of the blockade of that port, at the commencement of the war.

She was owned by a public enemy of the United States, a citizen and resident of New Orleans—and while so lying in that blockaded port, he transferred her to a British subject, resident there.

This apparently neutral character being given her, she was laden with the produce of the enemy's country, and left the blockaded port.

The contrivance of the neutral guise, successfully imposed upon the Commander of the "Powhattan," (one of the national ships, in the blockading service, by which the schooner was overhauled, on her egress from the blockaded

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port), and she was allowed to proceed upon her voyage, *via* the West Indies to Great Britain.

Her master was provided by the British subject in New Orleans, to whom the vessel was transferred, with a plenary power of attorney to make sale of the vessel in his name, and under this power he made a transfer to another British subject in England, the claimant, Harris. The vessel was laden in London with a large and valuable cargo, consisting entirely of arms, ammunition and warlike implements and equipments. It is claimed to have been the property exclusively of the firm of Isaacs & Co., the claimants. Its destination to the actual use and service of the army and navy of the public enemy of the United States, is palpable upon an inspection of the cargo—among which was found large quantities of army and navy buttons, manufactured in England, by the claimants, Isaacs & Co., as appears by the stamp upon them, but having also the impress of the then rebel capitol, "Montgomery, Alabama," and the further impress of the initials of the name assumed by the rebels for the country whose independence they are seeking to establish by war, "C. S. A."

With this cargo on board, the vessel was dispatched from London upon a voyage ostensibly to the petty port of Cardenas, upon the north coast of Cuba, conveniently situated to avail of a favorable opportunity to enter any harbor upon the enemy's coast.

When off Marquesas Keys, much nearer the Florida coast than Cuba, the vessel was overhauled by the United States steamer "Supply."

When it became apparent that the overhauling vessel was a ship-of-war of the United States, certain papers on board, which disclose the character of the enterprise (namely: that of supplying the enemies of the country with the means of continuing and prosecuting the war), were concealed, and were not given up upon demand of the ship's papers. They were found by the boarding

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officer, in prosecuting his search, hidden in a tea-pot in the ship's galley.

The papers found on board the vessel furnish no evidence of her ownership, for the British Register upon its face, is declared to be "no evidence of title."

All the usual papers of a vessel which relate to the cargo in any manner, are missing—not a bill of lading—not an invoice—not a manifest—not a scrap of paper is found which describes the cargo, or any part of it—the shippers or consignee.

All these facts—and many more, equally condemnatory, appear conclusively in the case, without any resort whatever to the supplementary testimony *in preparatorio* of the witness *Chadwick*, the 1st mate, which one of the counsel for the claimants, in his brief, (page 18), declares, with singular disingenuousness, to be the sole basis of the facts stated to be proved by the counsel for the captors in his opening argument!

This is the case in its simple outlines, presenting as clear and conclusive an instance of lawful capture and prize of war, demanding instant condemnation of vessel and cargo alike, upon every well established principle of international law, which four learned counsel, in three elaborate briefs, extending in the aggregate over forty-nine printed pages, declare to be a proper case for "restitution with costs, damages and expenses to the claimants;" "a flagrant case of unwarrantable exercise of the belligerent power;" "an unlawful seizure of the property of neutrals, subjecting them to detention, loss, and the interruption of their lawful commerce;"—and the capture is denounced as the act of "sea robbers, who scour the ocean, determined to seize everything, with a perfect knowedge that a mere form of prize jurisdiction awaited them ashore for dividing the spoil!"

It may well be doubted if a case has ever occurred more singularly illustrating the wild and insane extent to which intelligent counsel will allow themselves to be

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carried, in the fervid ardor of their zeal, in behalf of a cause they have espoused.

There is but one question involved in this adjudication, and embraced in the arguments of the learned counsel for the claimants, to which it is at all necessary to advert in this reply, and the inducement to this, even, is rather by reason of the importance which that question has assumed, in connection with several recent captures, which have acquired factitious interest resulting from the senseless clamor of "British neutrals," than by reason of anything of a novel character, either as legal proposition, authority, or illustration, presented in the elaborate arguments of the claimants' counsel. The question referred to, is that of the alleged inviolability of a neutral vessel, whatever may be the character of her cargo or its destination, by transhipment or otherwise, if she is ostensibly prosecuting a voyage between neutral ports.

Before considering that subject, the counsel for the captors desires very briefly to dispose of a few collateral matters, which have found their way into the discussion, to the unnecessary, and not quite creditable enlargement of his adversaries' briefs.

FIRST.

In the opening argument the counsel for the captors stated, that the captured vessel "contrived" to get out of the port of New Orleans, notwithstanding the blockade.

The learned counsel, whose brief is the last of the triad, facetiously refer the "contrivances" spoken of, to the U. S. man-of-war "Powhattan," by which vessel she was permitted to proceed after being boarded—and they subsequently ring the changes upon the words, "contrive" and "contrivances" in a manner calculated to lead one to suppose that they really thought they had

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succeeded in turning the flank of their adversary, by a happy and well conceived diversion.

But the contrivance referred to, although at the commencement of the war well calculated to deceive, and such as did in fact mislead many of our naval commanders in the blockading service, has never yet imposed upon this Court—although the attempt has been often made. It was the contrivance to secure immunity from capture by transferring an enemy's vessel to a so called British neutral, in a blockaded port.

This Court has had frequent occasion to denounce such transfers, as in fraud of belligerent rights—as utterly void—conferring no title whatever upon the transferee, and leaving the vessel, notwithstanding her British Register, and all the subsequent insignia of neutral ownership, in the precise position and character she sustained prior to such transfer—*vide* the "Cheshire," the "Mersey," the "Albert,'" the "Alliance," the "Ella Warley," the "Elizabeth," &c.

There is no better settled doctrine than that laid down by Lord Stowell, in the case of the "Gen. Hamilton," 6. Rob. 61—that the "mere act of purchase of a vessel from an enemy by a neutral in a blockaded port, is an illegal act, and utterly void."

The contrivance, then, was precisely that which imposed upon the unlettered commander—but which, in law, left the vessel the property of the public enemy at the time of her capture.

SECOND.

The learned counsel have severally fallen into the singular error of considering the statements contained in the claimants' test affidavit, as *testimony* in the cause—and they rely upon that as *proof* of the ownership of vessel and cargo, her destination, the consignment of her cargo, and the purpose of the voyage.

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This Court took occasion, early in the adjudications upon the captures of this war, to announce the well settled rule, that the papers, documents &c., found on board the vessel, and the testimony of the persons captured on board, constituted the *only evidence* on the hearing of a prize cause, in the first instance.

Vide the "Empress," the "Toone," and other cases—in which the claimants' counsel persisted in annexing to the claims test affidavits as proof, and in which they were stricken out by order of court.

THIRD.

Equally erroneous is the assumption of the learned counsel, that the British Register furnishes evidence of the ownership of the vessel.

The counsel says (thus combining two fundamental errors in one paragraph)—"The *testimony* of the claimant is fully corroborated by the British Register, for without a British owner there could be no British Register—and Mr. Harris is there declared to be the owner."

In the cases before cited, this Court took occasion to expose *this* error—and it is the more singular that the learned counsel should nevertheless have fallen into it, because, on the face of the Register itself, it is expressly declared, that it shall not be held as furnishing any evidence of title or ownership!

FOURTH.

The learned counsel say, referring to alleged proof of consignment of cargo, (*vide* page 38 of the aggregated briefs)—"The cargo was consigned by bills of lading to order of shippers."

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There was not a bill of lading of the cargo found on board. There is not a bill of lad ing in the proofs filed in the Registry of the Court.

After the consumption of so much time in the preparation of the argument, it is certainly greatly to be regretted that counsel were not more cautious and accurate in their investigation and statement of the facts.

An argument based upon an erroneous statement of facts, is an idle waste of words.

FIFTH.

On the 24th page of the aggregated briefs, the counsel says: "The seizure of the captain's stores, the burning of the spars of the vessel—dishonoring the flag—and the return of part of the preparatory proofs to Chadwick, constitute in themselves sufficient cause for the restoration of vessel and cargo. The Jane Campbell, Betts J."

Now, there is not one particle of evidence in the cause, proving or tending to prove, either one of these charges—and if they were all proved, the learned judge in the case cited, expressly decides, that however they may constitute good ground of forfeiture of the claim of a private captor, or just cause of action for damage, they do in no manner affect or impair the rights of the government to a decree of condemnation, if the capture were lawful.

SIXTH.

On page 5 of the consolidated briefs, the learned counsel says:

"Months passed on, and the claimants were unable to get the cause brought to a hearing." And again—"It

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may indeed be questioned whether a condemnation, after such *criminal delay* in proceeding to adjudication," "would be held binding upon the Government, whose subjects have been thus despoiled." This is positively unpardonable.

The District Attorney and the Counsel for the Captors announced their readiness for a hearing as soon as the testimony *in preparatorio* was filed—and the claims were put in—and since that time, they have repeatedly urged a hearing, but have always been met by an appeal for postponement and delay by the claimants' counsel. Nearly a year ago, and long prior to the taking of the supplementary testimony of Chadwick, they gave notice of a motion, that the hearing of the cause should be had forthwith. Each one of the counsel who now sign the several briefs appeared on that motion, and each one opposed. The counsel who has written the statements above quoted, was more urgent in his opposition than either of the other counsel—and it was chiefly at his earnest, personal solicitation, and by reason of his engagements elsewhere, as well as for the reasons stated in the opening argument of the Counsel for the Captors, that the power of the District Attorney was not exercised at the time to enforce a hearing and the cause was ordered to stand over until afer the last summer vacation.

The extraordinary statements referred to—(in view of the incontestible fact, that every day's delay in the hearing of the cause, since the completion of the original evidence, has been caused by the claimants' counsel exclusively, in spite of the continued protest of the District Attorney and Counsel for the Captors,) are wholly without excuse—and a singular departure from that ingenuousness which should alway charactize the arguments of counsel.

SEVENTH.

On the 38th page of the arguments, as printed together,

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the learned counsel say, thus, by implication, averring the presence of these papers :

"The cargo was consigned by *bills of lading* to order of shippers."

Certainly, the time asked and accorded to counsel for the preparation of these briefs, should have secured, at least, some degree of accuracy, in the statement of the *facts* in the case.

There were no bills of lading found on board the vessel—no such paper is with the proofs filed in the Registry.

The counsel themselves, apparently forgetting this statement on the 38th page, on the 43d page of their brief, attempt to excuse the admitted want of bills of lading—and say.

"It would be unreasonable to make their absence the ground of suspicion, if the desired evidence may be supplied from other sources."

Another of the counsel, admitting that no bills of lading were on board or in proof in the case, says that the captain expected to find them at Cardenas! (*vide* page 22) and the remaining counsel, also admitting the absence of the bills of lading, makes the astounding assertion, that

"We should as much expect to find a promissory note in the hands of a *drawer* or a bill of exchange in the hands of the *acceptor*, before it was paid, as a bill of lading in the hands of the master, while the goods are still in his possession and the voyage unperformed !"

EIGHTH.

The vessel having avowedly been transferred by an enemy to a neutral, in a blockaded port, and in time of war,—it was contended in the opening argument, not only that the transfer was absolutely void for this cause, but that the presumption of a simulated or colorable

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transfer made under such circumstances, was not rebutted in the manner required by law—namely, by the production of the Bill of Sale.

But the learned counsel says:—

"It is nothing that the Bill of Sale was not on board. Bills of Sale never travel with a vessel—they are kept by the owners at home, as their muniments of title, to be used when a sale, or other cause, requires evidence of title to be produced. There are cases in the books, where the absence of the Bill of Sale is mentioned, but these are cases where Bills of Sale are not produced in the nature of further proof, and their non-production is considered evidence of simulation."—(page 7 of brief.)

Is this so?—Was such the case of "The Two Brothers." 1 Rob. 111? Was such the case of "The Christine." 1 Spink, 82? Was such the case of the "Mersey"—recently decided in this Court, upon this very point (that being a vessel transferred by an enemy to a neutral during the war, and no Bill of Sale found on board or produced at the adjudication?) This honorable Court, recognizing the established doctrine of the preceding cases, in the printed opinion in the case of "The Mersey," (page 5) says:—

"The rule of the English law is emphatic, that the "absence of a Bill of Sale from the ship's papers, it being "the title deed to the vessel, and the want of proof of the "payment of the purchase money," (and here there is no pretence of such proof,) "in support of a claim by a neu-"tral to an enemy vessel, are circumstances so strongly "suspicious, and vitally defective to a *bona fide* title to "her, that the Court, after the condemnation of the vessel "on the preparatory proofs, *would not allow further proof* "to be given in support of the title."

NINTH.

In the opening argument of the Counsel for the Captors, the fact, that included in the cargo of the vessel was a

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large quantity of Army Buttons—four cases, containing seven hundred gross of buttons, so manifestly designed for the enemy, that they had stamped upon them the letters C. S. A., being the initials of the adopted name of the enemy's country—was held to furnish substantial and conclusive proof of the actual destination of the cargo to the military use of the enemy.

And how is this met?

The learned counsel for the claimants, on page 9 of the aggregated briefs, says:—

"It is, however, said that there were some buttons on board, marked "C. S. A." *Not more than enough to go round a single regiment, probably intended as a sample—an experimental specimen to try the market of Cardenas!*"

The staid and serious character of the learned counsel whose name is signed to this, forbids us to believe that it is written in jest, and yet it will pass well for a piece of quiet humor—an attempt to be facetious, as the readiest way of disposing of a perfectly unanswerable position. The "not more than enough to go once round a single regiment," forcibly reminds one of the excuse urged by the frail fair one (whose fatal lapse from virtue was proved to the world by a *living witness*) namely, that it was but a *very small* one!

TENTH.

The vessel when captured was found entirely destitute of the ordinary and necessary papers of a vessel, pursuing a foreign voyage. She had no invoices, no bills of lading, no manifest, and nothing whatever describing, or even indicating her cargo. Even the "cargo book," spoken of by one of the counsel for the claimants, consists of a few loose sheets of paper, containing nothing whatever but a few figures in pencil. This fact alone, as we all know, by the long established

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law of nations, is abundant warrant in time of war for the seizure and detention of such a vessel as lawful prize, and for her condemnation, unless full, clear and satisfactory explanation of the absence of the papers, reconcilable with the innocence of the voyage, shall be given at the earliest practicable moment.

No such explanation is given or attempted. The Captain says he expected to find bills of lading at Cardenas! And one of the counsel, on page 11 of the briefs, says:—The manifest "does not go with the vessel," and then speaks of a "manifest of importation," as a document which every laden vessel must have, but "only when the vessel is about entering the port of delivery, and it is the well known practice of ship masters to make it up from the cargo book in the last few hours of the voyage in time to present it to the boarding officers of the revenue."

Neither the "cargo book" as it is called, nor any scrap of paper found on board the vessel, nor any knowledge which the master or any one on board the vessel had, as they have testified, as to the details of the cargo, could enable them to "make up" anything bearing the smallest resemblance to a manifest of the cargo, to comply with the provisions of any law of any country.

The counsel further says, "It appears that one was made up in London from the bills of lading, and sent forward, probably authenticated by the Spanish Consul, which is understood to be the practice in commerce with Spanish ports.

The simple answer to this is, no such thing appears at all in any portion of the evidence in the cause, nor is there any such understanding as to the commercial practice.

Another of the learned counsel says, (page 34 of the briefs):—

"The "Stephen Hart" was no doubt seized solely because of the nature of her cargo, which excited suspicion of her destination."

No—she was seized because of the fraudulent conceal-

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ment of some of her papers, and the absence or destruction of the usual and ordinary papers of the vessel relating to the cargo, which, in connection with the character of the cargo itself, all directly pointed to the illegality of the voyage. The witness *Nellman*, the second mate of the claimants' vessel, explains the true cause of her seizure, with an intelligence and ingenuousness which is commended to the consideration of the claimants' counsel.

He says (*vide* answers to 4th, 5th, and 20th interrogatories)—"The only reasons for her capture, as I heard, was because she had warlike stores on board, and *also that she had not sufficient papers*" * * "She had on board a flag of the Confederate States of America, I last saw it a few days before the capture—I then saw it in the sail cabin, where sails are kept." "The day we were captured, I found the burgee in the main cabin on the floor, and *and I looked for the Confederate flag*, but I could not find it. I made a thorough search for it, but without success." "The first mate, a few minutes before our capture, gave some papers to the cook, *with directions to put them in a tea pot in the galley*, for the *purpose* of *concealing them*, but they were found by the U. S. officers."

The learned counsel for the claimants may also learn something as to the true cause of the capture of the vessel by a perusal (which they cannot yet have done) of the testimony of the witness, Robert Allen. They will find that he says, among other things, (*vide* his answer to the third interrogatory)—"We were seized because our papers "were said, by the boarding officers of the 'Supply,' not "to be correct, and because our cargo was very suspicious "in time of war—there being no manifest or bill of lading "—and the ship 'so near the coast of the enemy.'"

ELEVENTH.

The fact of the concealment of papers by the cook, *Liesk*, under the direction of the first mate, as the cap-

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ture was about to take place—which, as we have seen, was sworn to by *Nellman*, the second mate, was also sworn to by the cook, in answer to the 20th interrogatory. After his testimony was given, but before it was filed, and while yet in possession of the Prize Commissioner, upon its being read to Liesk, he found that he had failed to state what was said by the first mate, when he learned that the boarding officer had found the concealed papers. He desired to add this to his answer to the interrogatory, and the Court made a special order, *exparte*, that he should do so.

This order was subsequently opened, and claimants' counsel heard in opposition, and upon the hearing, the order was affirmed.

The counsel now object to this—and seriously argue that it was "grossly irregular." They seem to forget that the whole matter of the mode of taking testimony in prize causes is regulated by the rules, and is within the absolute and exclusive discretion of the Court, and their charge of gross irregularity is but an impeachment of the propriety of the exercise of this judicial discretion. But they also forget that their consent is on file, to the effect, that if the Court, on the hearing of the motion shall decide to allow the answer to be amended, that the amended answer shall stand as if taken after the argument!

TWELFTH.

The counsel for the claimants, each and all, have seen fit to dwell with great earnestness, and apparent seriousness, upon the fact of an alleged return of papers by the Prize Commissioner to the witness, Chadwick.

Without the least foundation for such an assumption, they argue that the production of these returned papers "would have proved damaging to the captors." Nay, fur-

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ther, the learned counsel, not content with this extraordinary assumption, actually pretends that the return of these papers to Chadwick was a part of the consideration paid for his supplemental evidence, given by order of Court eight months after!

How plain is the statement which scatters to the winds this phantom of the counsel's fruitful fancy!

First.—The *fact* of any return of papers to Chadwick, at all, no otherwise appears, than by an affidavit of the witness, made as it seems, May 6, 1862,—and filed October 25th, 1862—and is no more evidence in the case than the last mandate of the Dey of Algiers.

Second.—But if it were, it is now, for the first time, brought to the notice and knowledge of the District Attorney, the Counsel for the Captors, and the Commissioner, whose act is called in question—and now that Commissioner makes and files *his* affidavit, which is just as much evidence as the other,—and by that it appears:

First.—That the papers returned were not handed him by the Prize Master, and constituted no portion of the vessel's papers!

Second.—That the papers consisted solely and exclusively of private letters from Chadwick's wife to him!

Third.—That by the advice and consent of Chadwick and the then Assistant District Attorney, these private letters from Chadwick's wife to him, were all carefully read by the Commissioner, and were returned to him after finding that they contained not one word relating to the *Stephen Hart*—her cargo—her voyage—or destination—and

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Fourth.—That the return of these letters, as his private property, was made to Chadwick several months before his re-examination, and not only without reference to his re-examination, but without any knowledge or suspicion that such re-examination would ever occur!

THIRTEENTH.

The counsel for the claimants say, (page 44 of the consolidated briefs):—

"The log indicates that 'Cardenas' was solely her port of destination, except when the elements compelled variation."

But for this broad assertion, it would have been scarcely worth the while again to allude to the "log" in connection with the peculiar position of the vessel when captured.

She was captured off the Florida Coast—not more than 20 or 30 miles from land, on the 29th of January, 1862.

Two days before, she passed Cape Antonio—the westernmost point of Cuba—and "took her departure" to use the language of the log, from that Cape. She was, when captured, far off the direct course to Cardenas; but, as before said, she might have been thus driven off her course by adverse winds. It is, however, an exceedingly suspicious circumstance, that the log, which is declared to "indicate that 'Cardenas' was solely the port of destination," *contains not a single entry after the vessel took her departure, on the 27th of January, from Cape Antonio*, the westernmost extremity of the Island of Cuba.

FOURTEENTH.

The papers concealed by the cook of the vessel in th

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tea-pot, by direction of the first mate, Chadwick, (and marked Nos. 1, 2 and 3), are letters addressed to Chadwick just before leaving London, and contain evidence absolutely conclusive, of the illegal character of the voyage he was about to undertake.

The Court will, no doubt, carefully examine these precious letters. It is sufficient here to say, that the condemnatory evidence furnished by them, is wholly unanswerable.

How is this disposed of by the learned counsel for the claimant, who have ventured to assert that the "*sole ground* for the seizure of the vessel was the suspicious character of her cargo ?"

They say (page 45 of the briefs)—"The letters are *obviously* addressed to Chadwick, *under the idea that he was on board a steamer* adapted to run a blockade—and negative any supposition that the tortoised paced schooner was to assume the capacities of the hare. There is not a particle of proof that the "Stephen Hart" was a slow sailer—on the contrary, her reputation was that of an exceedingly fleet one, admirably adapted to the blockade running service—of this, however, there is also no proof in the cause.

But the assertion that "the letters are obviously addressed to Chadwick under the idea that he was on board a steamer," is an assertion so completely contrary to the fact, that the learned counsel must have overlooked the address of the letters.

They are addressed to Benjamin H. Chadwick, 1s officer of the "Stephen Hart!"

They are addressed to him on board that vessel—and they are addressed to him as on the eve of his departure upon the voyage, with a cargo destined for delivery in some port of the, so called, Confederate States!!

FIFTEENTH.

Each of the learned counsel for the claimants, in his

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turn, declares, that the vessel was "consigned to Cahuzac Brothers—a Spanish and Mexican House at Havana."

There is no proof or intimation anywhere, that "Cahuzac Brothers" is a Spanish and Mexican House at Havana—and the assertion that the vessel was consigned to them is a pure assumption. Its sole basis is a passage at the close of a letter from the shippers to the master, directing him to telegraph to Cahuzac Brothers, at Havana, on his arrival at Cardenas—"who will," the letter says, "on receipt of the message, communicate with you." This same letter directs the master to report on his arrival at Cardenas to Charles J. Helm, Esq., "to whom you will consign yourself and vessel, and from whom you will receive all orders for your future actions with reference to the schooner and cargo, and you will be pleased to implicitly obey all orders given by Charles J. Helm Esq.;" and then another letter is found directed to this same Charles J. Helm, Esq., introducing Capt. Dyett to him—and this letter is addressed to the care of Crawford, the British Consul, at Havana!

Now we began to perceive the reason for the anxiety of counsel to have it appear, without proof to sustain it, that Cahuzac Brothers, Spanish and Mexican merchants, were the consignees of the cargo.—*A consignment to some commercial house in Cuba* was essential to give even an appearance of truth to the averment that it was destined for delivery and disposal there.

But Charles J. Helm, Esq., the actual consignee, whose letters are addressed to the care of the British Consul, (who, in common with the entire brood of British Consuls, seems to have taken the traitors and the rebel cause under his special protection) is not only not a merchant, but is as notoriously an agent of the rebel government as Mason and Slidell are their diplomatic emissaries.

SIXTEENTH.

Some eight months after the testimony *in preparatorio* had been filed in the Registry, and the counsel for the

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Libellants, had often, and in vain, urged a hearing of the case, B. H. Chadwick, the first mate, captured on board the "Stephen Hart," again made his appearance in Court, and asked permission to give additional testimony in the cause; not to contradict anything he had before said, but simply to make more perfect and complete his former answers.

He stated the reason of his desire to give his additional evidence, and it was his sole reason. He was not only not influenced by any one interested in the capture or adjudication, but had held no communication direct or indirect with any such person, since his first examination.

His re-examination was ordered by the Court, and it was taken and filed—the question of its admissibility as well as its effect, being reserved for the hearing.

Now, the learned counsel for the claimants, after reading this supplemental testimony of Chadwick, have worked themselves into a state of wrathful indignation, and vie with each other in the employment of vituperative denouncements, of the witness, his evidence—the counsel for the libellants, who moved to have it taken—the commissioner, who bought it six months before, by restoring to Chadwick his wifes letters!!—and the government that induced it, by availing of the knowledge of Chadwick as a pilot on the Southern coast, and securing his employment to conduct a transport into the harbor of Port Royal!!!

Whence this overwhelming display of violence and wrath, because the Court, in the exercise of its unlimited discretion over the question of evidence in prize, and all its incidents, has seen fit to allow a witness, at any time before the hearing of the cause, to relate the whole truth, which he had but partially disclosed in his first examination? We need not look far for an answer to this question.

The time and manner of taking the supplemental testimony of Chadwick, was and is freely conceded to be

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in conflict with the rule of the Court. But this rule may at any time be varied by the power that made it. And an order was made in this instance, authorizing the departure from the strict rule, under which order the testimony was taken. The general rule is a salutary one, and is so obviously required, from considerations of public policy, that the question of the admissibility of this evidence which was taken in departure from the rule, being reserved, the counsel for the claimants hope to secure a decision of the Court excluding it from the case. Hence the course, by evident concert, agreed upon and put in practice by the several counsel.

First.—To denounce the witness as a perjured villain—though no attempt even is made to shew the least contradiction or inconsistency between the statements of his supplemental evidence and those made on his first examination—or to shew any contradiction or inconsistency between his supplemental or original evidence, and any other fact in proof by the testimony of any other witness. NO SUCH CONTRADICTION OR INCONSISTENCY CAN BE SHEWN,—and, *In the second place,* while denouncing the witness as a perjurer, and his supplemental evidence as a mass of lies, to pretend, that without this supplemental evidence, the case is wholly stripped of every vestige of condemnatory proof!

The Counsel for the Captors stated in his opening argument, and repeats the statement now, that the reception of the supplemental evidence of Chadwick is a matter of utter indifference. It came wholly unsought for and unexpected. It came upon the earnest solicitation of the witness himself, which the counsel who applied for the order of re-examination did not feel at liberty to refuse to hear. But as it was not sought for, neither is it relied upon as in any manner essential to the cause. If the Honorable Court entertains the slightest doubt as to the entire propriety of receiving and considering this supple-

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mental evidence under all the circumstances, he asks that the doubt may operate to preserve the inflexibility of the standing rule, and that the evidence may be rejected.

So far from its being true, as asserted by the claimants' counsel, that "*all the facts* stated by the learned Counsel for the Captors as proven, are gathered *solely* from this supplemental examination of Chadwick, (*vide* page 18); and again, that "denuded of Chadwick's supplemental evidence, the case for the captors dwindles down to a mere aggregation of misdirected suspicions, which could not amount to a reasonable cause of seizure" (page 46); every material fact sworn to by Chadwick in his supplemental examination, is fully proved by the other evidence and the testimony of other witnesses in the cause.

What are those facts, and by what evidence other than that of Chadwick are they established?

1*st*. In his supplemental examination, he swears that he threw overboard the rebel flag of the vessel on the day of capture.

That it was on board the vessel, is sworn to by every other witness; and Liesk swears that after the capture he made thorough search for it in vain.

2*d*. The concealment of the important papers in the teapot—the papers which disclose the true character of the voyage and actual destination of the vessel's cargo.

This fact is established by the testimony both of Liesk and Nellman, in their answers to the 20th interrogatory.

3*d*. The true and actual destination of the "Stephen Hart's" cargo to some Confederate port, either directly by that vessel, or by transhipment at Cardenas. This is positively sworn to in the supplemental examination of Chadwick, with a careful detail of the circumstances attending its shipment, by Hughes, the Confederate agent in London; his employment to conduct the enterprise, and the employment of the notorious rebel agent in Cuba,

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Chas. J. Helm Esq., to aid in its consummation, all tending to confirm the truth of his statements as to the true destination of the vessel's cargo.

But this fact is established conclusively by the papers found in the tea-pot—by the rebel buttons contained in the entire contraband cargo, and by the positive testimony of the witness Nellman (*vide* his answers to interrogatories 14, 16, 24 and 38), and of the witness Allen (*vide* his answers to interrogatories 12 and 24.)

Before indulging in their harsh invectives and unqualified charges of false swearing, against the witness Chadwick, it would have been a more proper, certainly a more charitable course, on the part of the claimants' counsel, to have compared his supplemental evidence with his previous testimony, and that of the other witnesses, and to have pointed out some contradiction or inconsistency, to justify, to some extent, at least, the wholesale charges of "fraud; bribery; corruption; mendacity; shameless effrontery, and Titus Oates perjury," so lavishly poured upon the devoted head of this witness, whose truth and honesty are not only unimpeached, but actually unassailed by any proof in the cause.

SEVENTEENTH.

The learned counsel whose brief closes the array of arguments for the claimants, upon the concession that the voyage of the "Stephen Hart" was undertaken by a neutral trader to supply arms and munitions of war to a belligerent, undertakes to rescue such an imputed trade from the charge of "flagrant criminality," made against it by the Counsel for the Captors. To stigmatize it as such, they seem to consider the result of a "too exuberant professional zeal and over fervid patriotism."

They evidently regard the commercial neutral trade of supplying arms and munitions of war to the enemies of

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our country, if not in itself, a laudable enterprise, certainly not censurable because in violation of any moral obligation, and only subjecting the property of the enterprising neutral trader to the penalty of confiscation, because he is caught in the act of violating a law of war.

Precedents, they say, will be sought for in vain, either in the language of Courts or Jurists in national law, to justify the charge of moral turpitude made against such a trade.

When the direct consequence of such a trade, successfully conducted, is considered, in the prolongation of the war with all its cruelties and horrors, and its long catalogue of present evil and future distress, we should certainly expect to find it denounced not merely as illegal, but in palpable conflict with every principle of a sound morality and a healthy conscience.

Any one at all familiar with the opinions of Lord Stowell, cannot fail to remember the persistency with which he denounces the trade of supplying arms to the enemy, as criminal in itself, as well as a violation of public law. A neutral trader engaged in a traffic so detestable by the universal law of nations, is stripped of his neutral character—is not allowed to interpose a claim in a Prize Court, and his property is condemned as that of a public enemy. The language cited by the learned counsel, from the opinion of Chief Justice Marshall, and the Commentaries of Chancellor Kent, is not at all at variance with this doctrince.

Upon this point, Mr. Justice Duer, in his able work on the Law of Insurance (vol. 1, pp. 754, 755, 772 and 775), reviews the doctrine as laid down by modern writers upon international law, and the decisions of the eminent Judges administering that law in the Prize Courts. His conclusions are worthy the calm consideration of the claimants' counsel, but it is hoped that his language may not have the effect to incite them to a "too exuberant professional zeal or an over fervid patriotism."

He states it as a general principal, *lying at the founda-*

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tion of the rules of international law, relating to the violation of the neutral duties in question, that such violation is *neither innocent nor lawful.* That it is not as some have asserted, a simple wrong, because of the penalty attached to it. That a neutral trader may not, with security of conscience, engage in a trade forbidden by the laws of nations simply because he is willing to incur the risk of the penalty. *That the act is wrong in itself, and the penalty results from the infringement of moral duty and obligation, as well as from the violation of law.*

That a neutral engaged in supplying arms or munitions of war to the enemy, is guilty of a moral delinquency, which makes him personally a party to the war, and justly subjects his property to the same treatment as that of the public enemy.

Having thus, it is hoped satisfactorily, disposed of the more prominent among the numerous errors, both of law and of fact, into which the several counsel for the claimants have fallen, in their discussions of the collateral subjects more or less connected with the main question in controversy in this cause, the way is cleared for the unembarrassed consideration of the sole important question in this adjudication.

That question is more broadly, as well as more elaborately, stated and argued in the closing brief of the learned counsel, and, therefore, to that statement and argument, attention will be more particularly directed.

We have seen that abundant cause was apparent at the time of capture of the "Stephen Hart," to justify and require her being sent in for adjudication, apart from, and in addition to, the exclusively warlike character of her lading, namely, the absence of all the usual and necessary papers of a vessel which describe her cargo and its destination (the bills of lading, the invoices and the manifest), and the concealment and discovery of important papers, which clearly indicated the actual destination of

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the cargo to the enemy's country and the enemy's use. Hence the assertion is made, in bold and unqualified terms, of the ABSOLUTE IMMUNITY FROM CAPTURE OF A NEUTRAL VESSEL, PURSUING A VOYAGE BETWEEN NEUTRAL PORTS, WHATEVER MAY BE THE ULTERIOR DESTINATION OF THE SHIP OR CARGO.

That this proposition is not stated in stronger terms than is intended by the counsel, the following language, quotedfrom page 33 of their briefs, will render apparent:

"What concern has a belligerent with the ultimate "destination of a cargo on board a neutral, bound from "a neutral to a neutral port?

"The belligerent has no right to shew his suspicion by 'an act of seizure." "*Until a transhipment has placed "the cargo in transitu from the belligerent to the neutral "country, any seizure is premature.*"

The learned counsel argue with great earnestness that this proposition is the accepted and established rule of international law, because they say it is contained in a communication from the Secretary of State of the United States to the Secretary of the Navy, dated August 8th, 1861, containing the explicit directions of the President, as to the instructions to be given to the Naval Commanders.

Of course it must be assumed, that the instructions *actually given* by the Secretary to the Naval officers of the United States, consequent upon the executive direction, were given in accordance with these directions. If, therefore, the learned counsel had but taken the trouble to refer to the circular letter to the officers of the Navy by the Honorable Secretary, they would have been spared the mortification of building an elaborate argument upon an erroneous assumption of the phraseology of that letter.

They quote from what they assume to be the letter, as follows:—

"That when the visit is made, the vessel is not to be "seized without a search carefully made so far as to

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"render it reasonable to believe that she is *carrying con-*
"*traband of war to the insurgents or their ports, or other-*
"*wise violating the blockade.*

Now, it unfortunately happens that the precise words actually contained in the circular, which disclose the very question at issue in this controversy, and entirely overthrow the labored argument which the counsel have erected upon it, *are omitted in this quotation.*

The important words are these, "DIRECTLY, OR INDIRECTLY BY TRANSHIPMENT." The circular actually being written thus :—"*So far as to render it reasonable to believe that she*
"*is engaged in carrying contraband of war for or to the*
"*insurgents, and to their ports* DIRECTLY, OR INDIRECTLY BY
"TRANSHIPMENT."

This, then (and not as stated by the learned counsel for the claimants), being the true, "accepted rule of international law, as applicable to the circumstances" as the same is clearly expressed in the circular instructions to the Naval officers, issued by the Secretary of the Navy pursuant to the directions of the President of the United States.—We contend as *matter of law*—

FIRST.

That a neutral vessel, pursuing a voyage between neutral ports, is nevertheless liable to capture and condemnation, if she be engaged in carrying contraband of war for or to the insurgents, and to their ports directly, or indirectly by transhipment, and as *matter of fact.*

SECOND.

That the "Stephen Hart," when captured, although ostensibly pursuing a voyage between neutral ports, was

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actually engaged in carrying contraband of war for or to the insurgents and their ports, directly, or indirectly by transhipment.

Let us first consider the question of law. Would it not be an extraordinary position to maintain, that the commander of a neutral vessel, visited upon the high seas by a belligerent cruiser, might say to the naval commander: "I have on board a cargo consisting exclusively of arms "and munitions of war. It is destined for the use of the "enemies of your country—but, inasmuch as it cannot so se-"curely escape the vigilance of your blockading cruisers "in this sailing vessel as in a fast steamer, I design to "have it taken out of this vessel and taken on board a "steamer at the little neutral port of Nassau, which lies in "the convenient neighborhood of your enemy's port, to "which the cargo is avowedly destined, and I am bound to "that neutral port for this express purpose; and, as I am now "going between neutral ports, you cannot detain me, but "you must watch and wait, until after the transhipment, "and the cargo is *in transitu* direct to your enemy's "port?"

No one can fail to perceive, at once, the utter absurdity of this position? Would any neutral trader of the world, (however arrogant he may have become, in his complacent assumption of the modern doctrines in the law of maritime warfare, which he has seen promulgated by the learned legal advisers of his Queen), venture to claim immunity from capture upon any such ground? And yet is it not the precise ground upon which the proposition of the claimant's counsel must inevitably rest?

Such is not the law. It would be strange, indeed, if it were.

The true rule, as gathered from all the ablest writers upon international law, as well as from the decisions of the Courts, is stated by Halleck in his work upon international law (*vide* Halleck, Ch. XXIV—Sec. II), and it is this: In order to constitute the unlawfulness of the

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transportation of contraband, it is not necessary that the *immediate destination* of the ship and cargo should *be to an enemy's* country or port. If the cargo is contraband, and destined, indirectly, by transhipment, to the use of the enemy's army or navy, the transportation is illegal, and the penalty is incurred. (See also, 1 Duer on Insurance, 530; Wheaton's Elements, Pt. 4, Ch. 3, Sec. 26, *The Commercen*, 1 Wheat. R., 388.)

The moment that a neutral vessel leaves her neutral port, bound to another neutral port, with a contraband cargo, not to be disposed of there, but to be transhipped, and thence forwarded to supply the public enemy—the offence is complete—the liability to capture is incurred, and it is by no means necessary to wait till the contraband cargo is in transit, after transhipment, direct to the enemy's port. (2 Wildman's Int. Law, 218; 2 Orolan, *Dip. de la mer*, ch. 6. *The Amina*, 3 Rob. 168. *The Trende Sostre*, 6 Rob. 390.)

Let it not be supposed, for a moment, that the proposition for which we contend as the established principle of law, that a neutral vessel sailing between neutral ports is liable to capture and condemnation, if she be engaged in carrying contraband of war, either actually destined for the enemy's port, directly, by a continuation of the voyage, or *indirectly by transhipment*, in any manner, impairs the rights of neutral commerce.

The cargo of a vessel, sailing from and to a neutral port, though it consist solely of arms and munitions of war, is nevertheless not contraband, if it be, in good faith, destined for *actual sale* in the market of the neutral port of destination.

It matters not how offensive such a trade may be, by reason of the proximity of the neutral port to the enemy's country, thereby creating a temporary and altogether artificial demand for the merchandize in the neutral market, and offering facilities to the enemy's agents, or others there, for the purchase of the requisite supplies

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for the use of their army and navy, which by watching for favorable opportunities, can easily, and at their own risk, be shipped into the enemy's ports. It is nevertheless in law a neutral commerce, of which belligerents may not complain.

But when such cargo of a neutral vessel is *not to be sold* in the neutral market to which she is bound, but is *to be transhipped* to a port of the enemy, it would be absurd to contend that the vessel is engaged in a *neutral commerce* simply because she is bound to a *neutral port.* The neutral port, in such case, is in no manner used as a port of commerce, but a mere port of call, a place of convenience, from which with greater facility to forward the cargo to its actual hostile destination.

A neutral vessel thus laden, with a cargo thus confessedly destined not for sale in the market of the neutral port, but for transhipment thence to the enemy's port and for the enemy's use, is precisely as much engaged in *carrying contraband of war to the enemy,* as though she were bound direct to the enemy's country, and thus we perceive the perfect harmony between the doctrine for which we contend, and the principle laid down by Chief Justice Marshal, in the case of the "Nercide" in 9 Cranch, so much relied upon by the claimant's counsel.

The counsel for the claimants have obviously felt the unanswerable force of this position—for although contending for the absolute immunity from capture of a neutral vessel sailing between neutral ports, regardless of the character or ulterior destination of her lading, they are nevertheless careful to state by indirection, and abundant repetition, but without the support of any evidence, that the cargo of the "Stephen Hart" was really designed to be disposed of in the market of Cardenas.

The counsel say (pp. 7, 8.)—"Our prejudices may easily lead us to suspect that these goods would ultimately reach the rebels, * * * but she was bound to a Spanish port, * * * where there was a *great commercial demand* for

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military merchandise, *caused by hostilities in several neighboring nations.*" And again, (pp. 9, 10.)

"There is no rule of international law which prevents a British merchant or manufacturer from having a warehouse in Jermyn Street, London, full of buttons marked "C. S. A." or "U. S. A." or any military goods, and selling them to all comers, nor which prevents the *having such a warehouse in Cardenas by a British or Spanish merchant, equally free to all purchasers, &c.*"

And again, page 23:—

"It would have been perfectly lawful for the owners to *have sold* C. S. A. buttons in the harbor of Cardenas."

And again, page 26:—

"The shipment of contraband of war, which only applies to a shipment to belligerents, as between neutral and neutral, *if designed for sale in neutral port, is free from arrest.*"

"C. S. A. buttons were as *free for sale* in the harbor of Cardenas as any other article of ordinary commerce."

And again, page 42:—

"A *demand* for all these articles *in Cardenas* by the insurgent States, would furnish sufficient and justifiable motive to a neutral merchant for lading such a cargo for Cardenas."

The assertion, though indirectly, yet so repeatedly and persistantly made, that the cargo of the "Stephen Hart" was in good faith destined for sale in the market of Cardenas, should be regarded as tantamount to a concession that if the cargo were not in truth so destined, but on the contrary, were destined for transhipment in the original packages, direct to the enemy's port and use, it would be contraband, and subject to lawful capture in its transit to the neutral port of transhipment.

But such concession is not required. It is the established law, and it now only remains to consider the question of fact involved in the case as expressed in the following terms:

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SECOND.

The ' Stephen Hart," when captured, though ostensibly pursuing a voyage between neutral ports, was actually engaged in carrying contraband of war for or to the insurgents and their ports directly, or indirectly by transhipment.

This fact is overwhelmingly established by the entire evidence in the cause.

It is established conclusively by the proof of a vast number of collateral facts and circumstances, incomparably more decisive, both separately and in the aggregate, than the positive testimony of Chadwick, or that of any other witness could be.

1*st.* It is proved by the position of the vessel when captured, taken in connection with the fact that for two days prior thereto, the ship's log or journal of the voyage *contains not a single entry.*

2*nd.* It is established by the proven fact that the vessel when captured is found completely denuded of all those papers which are essential for the description of the cargo, its character, its shippers and destination, and such as are always found on board of trading vessels pursuing an honest voyage.

If the cargo was intended for sale at Cardenas, bills of lading are essential, invoices are essential, a manifest is essential.

It is not in the wit of man to account for the absence of these important papers, upon any hypothesis consistent with the honest intent to dispose of the cargo in the market of Cardenas; upon the hypothesis of intended transhipment, the otherwise inexplicable absence, disappearance, destruction or concealment of the papers, becomes of easy and satisfactory solution.

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3rd. It is established by the concealment (under directions of the vessel's first officer) of important papers concerning the vessel and her destination, immediately prior to the capture and when it became imminent, and their discovery after capture by the boarding officer.

4th. It is established by the contents of those papers, which, being letters addressed by the master of a rebel vessel to the first officer of the "Stephen Hart," as such, disclose to him important facts to facilitate the delivery of the "Stephen Hart's" cargo in a rebel port, and furnish the most conclusive evidence of the true nature and character of the enterprize in which the first officer of the "Stephen Hart" was engaged, namely, the navigation of a vessel laden with a cargo designed for the use of the enemy's army and navy, and to be delivered in the enemy's port.

5th. It is established by the proven fact that the munitions of war were laden on board the "Stephen Hart" in London, through the interposition of one Hughes, an agent of the Rebel States. Sworn to be so, not alone by the first officer, but by the second officer of the vessel.

6th. It is established by the proven fact that the sole consignee of vessel and cargo at Cardenas, was not a merchant (for there is not a particle of proof of the assertion, so often repeated by the claimants' counsel, that Cahuzac Brothers were such consignees), but that he was a citizen of the enemy's country, a notorious traitor and agent of the Rebel States, one Charles J. Helm.

7th. It is established by the fact, that the letters of the shippers of the cargo, introducing the master of the "Stephen Hart" to the rebel agent, Helm, is addressed to the care of the British Consul, Crawford, at Havana, a notorious sympathizer with, and aider and abetter of, the slaveholders' rebellion.

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8 *th.* It is established by the fact that the letter of instructions by the shippers to the master of the "Stephen Hart" contains no word or syllable that indicates an intent or expectation to sell or dispose of the vessel's cargo in Cardenas, but on the contrary, the terms of that letter are consistent throughout with the intent to tranship to the rebel country and not to sell, and they are consistent with no other hypothesis.

9*th.* It is established by the proven fact that a large portion of the vessel's cargo was manufactured expressly for the enemy by the shippers themselves, and visibly stamped with the impress of the enemy, as well as the name of their first adopted Capitol, in connection with the firm name of the shippers and manufacturers, who are at the same time the claimants of the entire cargo.

10*th.* It is established by the proven fact, sworn to by several of the witnesses, whose testimony *in preparatorio* has been taken, in addition to the supplemental evidence of the first officer, that it was well known and understood, and matter of common talk on board the vessel, that her cargo was destined to supply the enemies of the United States, either directly by transportation in the "Stephen Hart," or indirectly by transhipment.

11*th.* It is established by the proven fact that the "Stephen Hart" sailed upon the voyage on which she was captured, having on board the rebel flag of the enemy's nation, and that directly after the capture, that flag could nowhere be found, after diligent search—thus while corroborating, rendering entirely unnecessary, the supplemental testimony of the first officer, that he himself cast overboard the rebel flag on the day of the vessel's capture.

12*th.* It is established by the foregoing proven facts, in their combined and aggregate effect, as well as by their separate and individual force, without the slightest refer-

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ence to, or dependence upon, the positive testimony of the first officer, Chadwick.

13*th*. The positive testimony of Chadwick given on his supplemental examination, may be discarded without any effect upon the result, or disturbing the inevitable conclusion. That evidence, if considered by the Court (and this is a matter entirely of judical discretion, and no good or sufficient reason has been or can be given, notwithstanding the violent and unreasonable tirade of the learned counsel for the claimants, why it should not be as fully considered as the testimony of any other witness), will be found to corroborate entirely the facts and circumstances proved by all the other witnesses, and established by all the other testimony in the cause. Whether it does or not strengthen and confirm those facts, and the conclusion to which those facts inevitably tend, is a matter for the determination of the Court.

When we consider, as every one must conclude, that the essential facts are abundantly and overwhelmingly established, without the aid of this supplemental evidence, the question of its admission or rejection becomes of such completely secondary importance, as to be really not worthy of the time consumed in its argument.

The Counsel for the Captors has elaborated this reply to the arguments of the learned counsel for the claimants, much more than he should have thought it necessary or desirable, but for the fact that the principal question involved in this case is of vast importance in itself, and constitutes the vital question in other maritime captures of great public as well as individual interest, which are shortly to be adjudicated in this Court.

He is troubled by no such apprehensions as seem to have disturbed the mind of the learned counsel for the claimants, that it is within his power or any man's power, in this or in any cause, so to "operate upon the judgment of this Honorable Court, as to impair that reputation

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for judical wisdom and impartiality as a tribunal administering the Code of Nations which has recently so coped with and disposed of great topics of public law, as subsequently to be affirmed by the highest appellate judiciary of the country, after having been subjected to an opposing judicial and professional ordeal without a parallel." Nor has he the slightest fear that the opinion of the learned Court in this cause, will fail to be cited hereafter by the side of those precedents which originated the justly earned tribute of the British Court of Appeals.—"That no authorities can be cited in the English Courts of the law of "nations with greater respect, than those of the dis-"tinguished jurists of France and America."

F. H. UPTON,
Counsel for the Captors

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